IN THE SUPREME COURT FOR THE UNITED STATES

NO. 80-2077

WILLIAM LEEKE, individually and in his official capacity as Director of the South Carolina Department of Corrections; PETER THEM, individually and in his official capacity as legal advisor to the South Carolina Department of Corrections,

Petitioners

-versus-

MELVIN LEE TIMMERMAN, and ROBERT THOMAS, individually and on behalf of all others similarly situated,

Respondents

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RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

---

Allan R. Holmes
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LAW OFFICES OF ELLIOTT T. HALIO, CHARLESTON, SOUTH CAROLINA

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## STATEMENT OF THE CASE

As a supplement to the statement provided by the Petitioners, the Respondents have included in the Appendix hereto the confidential Memorandum of the Petitioner, Peter Them. (Plaintiff's Exhibit 1). This Memorandum was found by the District Court to have been directed to Petitioner William D. Leeke. It forms the basis for many of the factual findings of the District Court.

## REASONS FOR DENIAL OF THE WRIT

### THE RIGHTS OF SOUTH CAROLINA INMATES TO SEEK CRIMINAL ARREST WARRANTS ARE CONSTITUTIONALLY PROTECTED

Petitioners argue that there is no constitutional right to require the issuance of an arrest warrant and that this precludes any constitutional protection of the liberty of an individual to seek the issuance of an arrest warrant.

This argument presents a nonsequitur which was soundly rejected on first hearing by the United States Court of Appeals for the Fourth Circuit:

> We have no doubt that Plaintiffs, even though they are inmates, have some first and fourteenth amendment rights to air their grievances and to have access to judicial procedures to redress them. Procunier v. Martinez, 416 US 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974); Cruz v. Beto, 405 US 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972); Johnson v. Avery, 393 US 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969); Dowd v. United States ex rel. Cook, 340 US 206, 91 S. Ct. 262, 95 L. Ed. 215 (1951); Cochran v. Kansas, 316 US 255, 62 S. Ct. 1068, 86 L. Ed. 1453 (1942); Lane v. Correll, 434 F. 2d 598, 600 (5th Cir. 1970). We think that Plaintiffs have alleged bad faith and intentionally harassing efforts to deny these rights, including but not limited to bad faith and harassing efforts to prosecute them.
>
> Timmerman v. Brown, 528 F. 2d 811, 815 (4 Cir. 1975).

As then Judge Bell noted in the cited Lane v. Correll opinion:

> It is well to note in connection with this controversy that a citizen has no right to have an arrest warrant issued. The only constitutional right involved here is the citizen's ability to set in motion the governmental machinery which redresses violations of municipal ordinances; i.e., the right to seek an arrest warrant. . . .
>
> Lane v. Correll, Supra, at p. 600.

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While an individual has no constitutional right to will the actions of his government, this Court has recognized his right, even as a prisoner, to petition:

> . . . all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v. Avery, 393 US 483, 485; Ex parte Hull.
>
> California Motor Transport Co., et al. v. Trucking Unlimited, et al., 404 US 508, 510 (1971). Cf: Procunier v. Martinez, 416 US 396 (1974).

Similarly, while he may not demand a favorable exercise of judicial discretion, the right of a prisoner to address a judicial forum is protected by the due process clause of the Fourteenth Amendment. Procunier v. Martinez, 416 US 396 (1974); Bounds v. Smith, 430 US 817 (1977).

Moreover, access to courts is protected by the privileges and immunities clause:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.
>
> Chambers v. Baltimore & Ohio R. Co., 207 US 142, 148 (1907). [1]
>
> This as Mr. Justice Frankfurther has pointed out ". . . has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures." Bridges v. State of California, 1941, 314 US 252, 291,62 S. Ct. 190, 207, 86 L. Ed. 192 (dissenting opinion).
>
> Garland v. Torre, 259 F. 2d 545 (2 Cir. 1958), cert. den. 79 S. Ct. 237 (1958). (Emphasis added).

In South Carolina, anyone with the capacity to provide sworn information is entitled to attempt to cause the issuance of an arrest warrant:

> All proceedings before magistrates in criminal cases shall be commenced on information, under oath, plainly and substantially setting

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1 The Chambers opinion has been recognized by the Court below as furnishing a basis for protection of a prisoner's right of access to Court. McCray v. State of Maryland, 465 F. 2d 1, 6 (4 Cir. 1972).

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forth the offenses charged, upon which, and only which, shall a warrant of arrest issue.[2]

Section 22-3-710, S.C. Code of Laws (1976), as amended: 1870 (14) 403.

The right of access sought by the Respondents easily distinguishes the case at bar from those which have been cited by the Petitioners. In particular, the Respondents in their second appeal to the Court below, placed heavy reliance upon a case which predates the 1975 opinion of the Court below. Linda R.S. v. Richard D., 410 US 614 (1973). There, Linda R.S., the appellant, sought to require a Texas solicitor to criminally prosecute for nonsupport the putative father of her illegitimate offspring. A Texas statute had been judicially construed to provide for the prosecution and incarceration of only the nonsupporting fathers of legitimate children. Linda R.S. claimed that this judicially ordained failure to prosecute discriminated unconstitutionally against illegitimates and their mothers. This Court held that Linda R.S. was without standing to litigate this question. First, and most importantly, the Court noted that the appellant had made ". . . no showing that her failure to secure support payments results from the nonenforcement." Linda R.S., at p. 618.

In a further discussion of the standing question, this Court opined that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Linda R.S. at p. 619.

This "dictum" has subsequently considered an overboard proposition of

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2 As Petitioners argue, the actual commencement of a prosecution is dependent upon an exercise of discretion by the magistrate; its continuance is dependent upon the actions of various state criminal authorities. Nevertheless, the responsibility imputed by the law to the private citizen affiant for his initiation of the criminal process is considerable.

See: Marshall v. Gunter, 6 Rich. 419 (S.C. 1853); McCall v. Alexander, 61 SE 1106 (S.C. 1908); North British & Mercantile Ins. Co. v. Feldman,149 F. 2d 582 (4 Cir. 1945); Gibson v. Brown, 141 SE 2d 653 (S.C. 1965).

Surely this constitutes some evidence of a particular and cognizable relationship between the efforts of a person attempting to procure an arrest warrant and the consequences of these efforts. Moreover, the alleged interference with the issuance of arrest warrants by the Defendants was conceded to be violative of State law in 1975. Timmerman v. Brown, Supra, 528 F. 2d 813, N.2. The "question" of the propriety of this concession was never raised by the Respondents during the trial of this case by the District Court.

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law by one Court [3] and questioned by another [4] as inappropriate for application in cases involving prison assaults. All of this would seem irrelevant to a consideration of the issues actually before this Court. It may well be that commanding an exercise of prosecutorial discretion is beyond the "cognizable" interests of litigants. Nonetheless, this furnishes no authority for the unjustified interference with the lawful exercise by inmates of their rights of access to court.

In their invocations of the criminal process, the Petitioners were obviously seeking the protection which would result from the criminal prosecutions of their prison guard assailants. In their tightly controlled and closed environment, [5] inmates most assuredly have a particularized need for the criminal prosecutions of their prison guard assailants. However, even if they are without standing to sue for these actual prosecutions, their rights of access remain constitutionally protected at the "foundation of orderly government." Chambers v. Baltimore & Ohio R. Co., Supra.

Apart from arguments which seem to obfuscate the graphic distinctions that must be made between the rights of prisoners who seek access to our courts and the general impotence of litigants who seek to mandamus criminal prosecutions, the Petitioners proffer their opinion that the existence of civil courts renders extravagant the access which is afforded prisoners to the criminal justice system. [6]

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3 Nader v. Saxbe, 497 F. 2d 676, 681 N. 27 (D.C. Cir. 1974).

4 Inmates of Attica Correctional Facility v. Rockefeller, 477 F. 2d 375, 378 (2 Cir. 1973).

5 Cf: Wolf v. McDonnell, 418 U.S. 539, 563 (1974).

6 This discussion by the Petitioners of alternatives seems to spring from their reading of United States v. Kras, 409 U.S. 434 (1973). Kras simply holds that congress may rationally enact legislation in the area of economics and social welfare which requires a reasonable fee for its utilization. Cf: Weinberger v. Salfi, 422 U.S. 749 (1975). "Bankruptcy is hardly akin to Free Speech. . ." Kras, Supra, at p. 446. Surely the Petitioners do not contend that the court conspiratorial acts they have individually directed against prisoners were part of a rational legislative scheme in the area of economic and social welfare; nor should they be heard to gainfully argue that the legally sanctioned arising of criminal wrong to a judicial officer is anything but protected speech. These findings would, however, seem preconditions to an application of the Kras opinion to this case.

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That both the criminal law and the civil law exist is strong evidence that neither is an adequate substitute for the other. One must wonder how often the sovereign State of South Carolina has heretofore seen fit to argue that the public interests served by its criminal law may be served as well by civil litigation maintained by the inmates of its penal system.

Our government has seen fit to foster a multitude of constitutionally protected opportunities for individuals to collectively fashion and serve the fundamental interests of the public. As has been herein argued, those opportunities, when presented as rights of access to Courts, must be seen as constitutionally protected from unjustified interference by persons acting under color of state law.

Petitioners have argued that important state interests are furthered by prohibiting inmates from directly seeking the issuance of arrest warrants from judicial officers. No evidence was presented at trial in support of this contention even though the warrants requested by Plaintiff Respondents were issued prior to the end of the trial of these issues in the District Court. Even if further warrants should issue against prison guards, they would retain, as state criminal Defendants, a panopoly of cosntitutional rights designed to assure their fair trial. Anderson v. Leeke, 348 SE 2d 120 (S.C. 1978) (Inter alia, ". . . the magistrate may refuse to issue a warrant."); Roberts v. State of South Carolina, 271 SE 2d 115, (1980); moreover, malicious and bad faith prosecutions initiated at the instance of inmates could be enjoined by federal courts. Timmerman v. Brown, Supra.

In addition, the nature of prison confinement and control make it difficult for freeworld persons to observe prison guards assaulting inmates. Such freeworld persons as there are within prisons will actually be colleagues of the criminal guards and may have an understandable reluctance to seek the prosecution of their fellow employees.

Finally, prisoners found to have abused their rights of access to courts by maliciously prosecuting prison guards may be subject to institutional discipline in appropriate cases.

Contrary to the assertions of the Petitioners, the Respondents have not sought to control the exercise of prosecutional discretion. It is a matter of South Carolina judicial record that the prison guards for whom arrest warrants were issued have not yet been tried. Their trials would require the affirmative action of the South Carolina Solicitor.

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The Respondents have successfully sought to insure that they are provided unfettered access to the South Carolina Court system. Their rights of access to Courts are "of incalculable importance in the protection of rights even more precious."[7] The exercise of these rights of access can harm no legitimate administrative interests of the Petitioners.

## CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted.

ALLAN R. HOLMES
Attorney for Respondents

Halio & Holmes
128 Meeting Street - Box 731
Charleston, South Carolina 29402
(803) 577-5200

This 20th day of July, 1981.

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7 Co[illegible] v. Peyton, [illegible] 2d 905 (4th Cir. 1966)

LAW OFFICES OF ELLIOTT T. HALIO, CHARLESTON, SOUTH CAROLINA

MEMORANDUM

CONFIDENTIAL

TO: Mr. William D. Leeke
Director

FROM: Peter Them
Legal Assistant

SUBJECT: Criminal warrants surrounding the August 11, 1973, disturbance at CCI

DATE: October 12, 1973

On October 11, 1973, immediately following a series of preliminary hearings prior to General Sessions Court, Magistrate Brown asked me if I would speak with him a moment. He informed me that the Public Defenders Office had drafted four warrants for three current and one former correctional officers. The inmate involved with this is Melvin Lee Timmerman who was charged with assault and battery with intent to kill and inciting to riot. He was bound over for general sessions court on the assault and battery charge and Judge Brown threw out the inciting to riot charge. Mr. Townsend has informed me he plans to reinstate the inciting to riot charge with the other grand jury.

The three current officers are Assistant Correctional Supervisor Benjamin and correctional officers Weston and Irvin. These were the three officers who were beaten by a group of inmates when they attempted to arrest Mr. Timmerman during the disturbance on August 11. These three individuals also were witnesses against Mr. Timmerman at his preliminary hearing and will be witnesses against him in General Sessions Court. The fourth officer, Officer Hart who struck Inmate Timmerman, was terminated as a result of his actions.

I discussed with Judge Brown the possibility of the officers reporting to him at their convenience and personal recognizance bonds being authorized. He stated that it would be no problem of the three officers still in our employ, but that Officer Hart may have to post surety bond.

I returned to CCI and relayed this information to Warden Martin who was most displeased as he felt that such a precedence would be very subject to abuse and would have a very serious effect on officer morale. We then discussed ways of avoiding this problem and decided that I would meet with Sheriff Powell, Deputy Attorney General, J. C. Coleman and Solicitor Foard, as each of these three individuals have either dealt with similar situations or would be involved in this

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type situation at a later date. Sheriff Powell suggested that an outside investigation be conducted so that Solicitor Foard could present this to the Grand Jury to avoid any possibility of having to go through the embarrassment of having to go to a criminal trial.

Mr. Coleman recommended that the three officers who are still in our employ accept the jurisdiction of the magistrate and a personal recognizance bond be arranged. He said this could all be handled over the telephone between magistrate Brown and myself. He then stated that if I would send him the warrants and any additional information, he would see to it that Solicitor Forad arranged to have these cases brought before the Grand Jury and through his "firm leadership and guidance" the grand jury would dismiss the warrants. He stated he felt sure that it would be no problem in the Attorney General's Office in defending the three current employees. From my recitation as to Officer Hart's provacation for striking inmate Timmerman, he felt as though the Attorney General's Office would probably defend Officer Hart also.

Solicitor Foard recommended that a letter should be written to Judge Brown from himself urging, almost to the point of ordering, Judge Brown not to become involved. In the letter, which is attached, Solicitor Foard stated that he would request SLED to conduct an indept investigation surrounding the charges made against the four officers so that he could recommend a course of action to the grand jury. He quite candidly stated that according to my recitation of the facts, there would be no indictments against Officers Benjamin, Weston and Irvin. He was unsure as to Officer Hart considering only one blow was thrown and the provocation that existed. The attached letter was intended to be a draft which Solicitor Foard said that he would work out with Mr. Coleman. When I left Mr. Foard, we had the understanding that he would not mail the letter until I assured him that the Department of Corrections consented to its wording and recommendations.

I have discussed all of the recommendations with Warden Martin, Mr. McCuen and Mr. Lucius, all four of us agree that Solicitor Foard's course of action is by far the best.

When I returned to my office at approximately 2:30 p.m. Friday, Mr. Lucius informed me that Solicitor Foard, in consultation with Mr. Coleman had decided to mail the letter. As it is difficult to slow down Solicitor Foard when he decides on a course of action, Mssrs. Martin, McCuen, Lucius and myself felt that you would have no objection to the contents of the letter.

Mr. McCuen has requested me to ask you to contact him as to the proper newspaper coverage involved with a suggestion that we release a story so that it will not appear that Solicitor Foard has ordered SLED to investigate the

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Department of Corrections. Mr. McCuen feels that this problem can be solved by affirmative action on our part.

S/
Peter Them

PT/cm

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IN THE SUPREME COURT FOR THE UNITED STATES

NO. 80-2077

RECEIVED
JUL 22 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM LEEKE, individually and in his official capacity as Director of the South Carolina Department of Corrections; PETER THEM, individually and in his official capacity as legal advisor to the South Carolina Department of Corrections,

Petitioners

-versus-

MELVIN LEE TIMMERMAN, and ROBERT THOMAS, individually and on behalf of all others similarly situated,

Respondents

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

---

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Halio & Holmes
Attorneys for Respondents

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LAW OFFICES OF ELLIOTT T. HALIO, CHARLESTON, SOUTH CAROLINA

I am Allan R. Holmes and have represented the Respondents since the commencement of this legal matter by the filing of the Complaint in the District Court of South Carolina on April 9, 1974. The Plaintiffs have proceeded in forma pauperis throughout their pursuit of this legal action. On two occasions, I have been appointed by the United States Court of Appeals for the Fourth Circuit to serve as counsel for the Respondents. A copy of the most recent Order of appointment and attendant correspondence is hereto attached. Obviously, the Order erroneously assigns me as counsel to represent the "Appellants."

I am presently informed and believe that Respondent, Robert Thomas, is incarcerated at the Central Correctional Institution of the South Carolina Department of Corrections in Columbia and remains with neither income nor assets.

Mr. Timmerman was released from custody some years ago and although he has maintained communication with me over the years, I have not heard from him recently and am unable to provide any information concerning his financial resources.

If the Order of the Court of Appeals hereto attached is insufficient together with this Affidavit to form a basis for this Motion, I will be pleased to obtain such additional information as directed by this Court.

ALLAN R. HOLMES

SWORN to before me this

20th day of July, 1981.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 4-16-89

LAW OFFICES OF ELLIOTT T. HALIO, CHARLESTON, SOUTH CAROLINA

The Respondents, by their undersigned attorney, hereby move for leave to proceed in forma pauperis in the above captioned proceeding. An Affidavit of the undersigned counsel together with the Order of the United States Court of Appeals for the Fourth Circuit appointing him as counsel for the Respondents in the proceeding below is hereto attached in support of this Motion.

ALLAN R. HOLMES
Attorney for Respondents

CERTIFICATION

This is to certify that the undersigned attorneys did this date serve the Motion for Leave to Proceed In Forma Pauperis and Affidavit, upon the attorneys below listed by mailing a copy of the same to their offices, Edwin E. Evans, Office of the Attorney General for the State of South Carolina, Post Office Box 11549, Columbia, South Carolina, 29211, postage prepaid on this 20th day of July, 1981.

HALIO & HOLMES

BY: ALLAN R. HOLMES
Attorney for Respondents

128 Meeting Street - Box 731
Charleston, South Carolina 29402

(803) 577-5200

SWORN to before me this

20th day of July, 1981.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 4-16-89

LAW OFFICES OF ELLIOTT T. HALIO, CHARLESTON, SOUTH CAROLINA

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-6800

Melvin Lee Timmerman, et al,

Appellees,

versus

William Leeke, etc., et al,

Appellants.

---

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge

---

IT IS ORDERED that Allen R. Holmes of Charleston, South Carolina, be, and he is hereby assigned as counsel to represent the appellants in the above-styled case.

FOR THE COURT - BY DIRECTION

/s/ William K. Slate, II

CLERK